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A LEAGUE OF NATIONS ACCORDING TO THE AMERICAN IDEA*

By ALPHEUS HENRY SNOW

THE so-called "Covenant of the League of Nations" has the form of a treaty, but it is something different from and more than a treaty that is to say, it is a constitution. It was, in fact, originally so called. If adopted, it would constitute a new composite body politic and corporate, which would be a union of States, of which the United States would be a member. This new body politic and corporate would have a political and legal personality distinct from that of the United States. It would have a specific name—the League of Nations. It would manifest its personality through a common organ, which would sit in two divisions—one called "the Council," and the other "the Assembly." To this common organ the constituent States would delegate specific political and corporate powers, thereby renouncing the exercise and wielding of these powers to the common organ. The act of ratifying any treaty which contains this "covenant" would be an act of consent on the part of the United States to enter into a union with foreign States, and for a period of time more or less definite to participate and partially submerge its personality in this new union. The power which the United States would exercise in entering into and participating in the union would not be the treaty power proper, but the analogous but vastly greater power of union. Specifically the power thus exercised would be the power of political union, the supreme phase of the power of union.

The first question presented by the subject assigned for this paper—a League of Nations According to the American Idea—therefore is, What is the American Idea, and what is its effect upon the power of the United States to enter into and participate in unions with foreign States?

The American Idea

The American Idea, held by the American people from the foundation of the American colonies and ever since held by them, was formulated in the Declaration of Independence in these words:

> "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

This statement of "self-evident truths," as is now generally agreed by publicists who have investigated its sources, is a summary and synthesis of the results of the work of the Protestant theologian-lawyers of the sixteenth, seventeenth, and eighteenth centuries. It is a translation of the Ten Commandments of the Old Testament and the Two Great Commandments of the New Testament, which in the Bible are expressed in terms of fundamental divine command and fundamental divinely imposed duties applicable to all men, into terms of fundamental law and fundamental rights applicable to all men. The translation of the Biblical Commandments into the fundamental law of personal conduct and the fundamental rights of men against men was made in 1536 by John Calvin, in the chapter on "The Moral Law" of his "Institutes of the Christian Religion." In 1594 Richard Hooker, in the first book, "Concerning Laws and Their Several Kinds in General," of his "History of Ecclesiastical Polity," derived from Calvin's principles the idea of government by the consent of the governed and of governments as agents of the governed. Bishop Benjamin Hoadly, in 1710, taking Hooker's argument as his basis, evolved the idea, in his "Essay on the Original and Institution of Civil Government," of the unalienability of the fundamental rights of men, and from this thesis derived the rights of men against governments, and the duties of governments to secure the unalienable rights of men against each other. The political doctrines of Calvin and Hooker had become the basis of the liberal thought of Europe at the time the American colonies were founded, and were by the American colonists accepted as self-evident truths. The British and American liberals of 1710 accepted Hoadly's doctrine as completing that of Calvin and Hooker, and the composite doctrine of these three philosophers became the principles of the British Whig party and of the American colonists. Against the Tory and Imperialist reaction in Great Britain, the Americans insisted upon their traditional principles, making their own declaration of them, and successfully maintained these principles by revolution.

The words of the Declaration, when read as an exposition of the legal and political meaning of the Biblical Commandments, are easy to be understood. The equal creation of all men by a Common Creator is taken as the prime axiom of all law and political science. The fundamental duties, imposed by divine command on each man, to his Creator, to himself, and to his neighbor evidently necessitate that he should have those rights against all other men and all bodies of men, which are needful to enable him to fulfill these duties. Such rights are of an extraordinary character. They arise not by the gift of any man, but by "endowment" of "the Creator." These rights not having arisen from gift of any man, cannot be given away by any man. They are "unalienable." The rights which are needful to enable each man to perform the duties imposed by the Commandments are not completely specified in the Declaration, but it asserts that "among these" are the right of "life," the right of "liberty," and the right of "pursuit of happiness." The right of property is regarded as a right which is not fundamental, but as one which is incidental to and limited by these fundamental rights. Governments, however instituted, are declared to be bodies of men who derive their just powers from the consent of the governed. These words are taken from the formulas of the Roman law of agency and signify that the relation of governments to the governed is analogous to that of agency in the private law. It is not said how govern-

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ments are to be instituted, the statement being simply that "governments are instituted among men." The fundamental right of all governments is declared to be that of agents of the governed to "secure" the fundamental rights of all men by all reasonable and needful means and measures. These rights being unalienable, governments can, in the interests of the general security of these rights, deprive any man of them only for willful violation of the equal rights of others, by a due process established by a law consistent with the fundamental law and previously made by consent of the governed.

The American Constitutions

The American constitutions are logical applications of the fundamental law as declared in the Declaration of Independence. The State is regarded not as the source of all law, but as being itself subject to the fundamental law and as a human institution or agency to secure human rights under this law. Governments, being bodies politic and corporate and agents of the governed, properly act under written powers of attorney given by consent of the people governed, delegating plenary powers of agency to secure the fundamental rights of men, and duly limited and safeguarded in such way as to secure the faithful and efficient performance of the agency.

By reason of the universality of this fundamental law, which Americans hold as the American Idea, the powers of all States and all governments are necessarily limited in all their relations, including their relations to other States and governments. For the protection of the fundamental rights of men, independent States and governments may wage war with other States. To assure the observance of the fundamental rights of their citizens within the jurisdiction of other States, or on the high seas, which are of common jurisdiction to all States, they may enter into treaties with other States. To extend the area within which these fundamental rights are secured, they may properly enter into unions with foreign States, of such kinds and on such terms as will enable them all more perfectly to secure the fundamental rights of all men and to extend the area within which these rights are in fact secured.

Unions of States may, according to the American Idea, be equal unions, in which the States united are in the relation of equal associates, partners or cotenants; or they may be unequal unions, in which some of the members are in temporary subordination to one or all of the other members. The Declaration, as has been said, does not require that governments should be instituted by the governed, since it states simply that "governments are instituted among men;" and hence a State which itself observes the fundamental law and the people of which have instituted a government by consent may institute a government for peoples which have not yet attained to the capacity of consent or to a knowledge of the fundamental law, and may unite these peoples to itself as States in unequal, subordinate, and tutorial union.

Three Ways of Effecting Union

Thus, according to the American Idea, a union of States may be effected in three ways: By two or more States which recognize the fundamental law and secure fundamental rights, mutually entering into an agreement to constitute a new union, as equal partners and cotenants; by such an existing union and such a State not of the union mutually agreeing that the State shall be admitted to the union as an equal partner and cotenant under the constitution of the union; and by such a union or State uniting to itself as a State in unequal, subordinate, and tutorial union a people which has not yet attained to the capacity of consent or to knowledge of the fundamental law, for the purpose of educating them up to the capacity for consent and to the knowledge of the fundamental law, in order ultimately to set them up when fully educated, as an independent State, capable of joining them in equal union.

For any State the act of entering into a union with foreign States is of momentous importance. Any kind of union of States involves each State in an intimate, confidential, and more or less permanent and obligatory relationship with other States of diverse principles and standards. Such a relationship is particularly difficult and dangerous for those States which have set up for themselves the higher or the highest standards. The American Idea is the highest standard possible. There is great danger, since the United States is at present the sole custodian and guardian of the American Idea, that in a political union the American Idea might be submerged and lost. The more intimate, confidential, obligatory, and permanent the relationship is, the greater is the danger to the American Idea. Nevertheless, the present situation of the world requires that there should be union of States to the greatest extent practicable, and the United States must face the situation and fulfill its duty in this respect.

Safe-Guarding the General Union

In a general way, it may be said that a League of Nations—that is, a general union of independent States on equal terms—according to the American Idea would be one which would constitute a relationship between them of as intimate, confidential, obligatory, and permanent a character as is consistent with each protecting itself and being protected in its right to determine its own action in all cases according to its own ideas, provided these ideas are in conformity with the universal and fundamental law. A union of States, to be safe, according to the American Idea, would have to be under a written constitution containing delegations of power to appropriate common organs, and providing limitations and safeguards upon the exercise of the power. Moreover, to assure adequate protection of each State in a union against usurpation of power by the union, the constitution of each of the States of the union would have to contain provisions adapting the government of the States to any possible relationship of union with other States.

Before it will be possible to have any general obligatory union of States, therefore, the political scientists and lawyers of the various States will have to do a great amount of work. First of all, the power of treaty will have to be differentiated from the power of union. They are, in fact, two different and distinct powers, having a scope and purpose different from each other and governed, therefore, by different principles. The power of

treaty should be confined to making agreements other than those constituting a personal and confidential relationship between States; the power of union to making agreements and constitutional arrangements for entering into personal and confidential relations with other States. Each State will have to differentiate in its own constitution the powers of union from the power of treaty and carefully safeguard the exercise of both powers; for under guise of exercising the treaty power it is possible to precipitate the State into union.

No Sufficient Present Checks

At present there are no sufficient constitutional checks in the constitution of any State to prevent executives from entering into secret treaties, secret concerts, secret alliances, and secret unions. There is no consensus of opinion among political scientists concerning the proper organs of the State to exercise the power of treaty or the power of union. Evidently the most august body in each State—its legislative assembly—is the proper body to be intrusted by all States with the power of union. No consensus of opinion exists concerning the procedure to be observed in entering into union. Evidently the solemnity of the act requires in each State that the act be done under the most deliberate and solemn procedure. No consideration has yet been given by any State to the new constitutional organs and processes which have become necessary, now that the living of States in constitutional union has become a practical necessity and all foreign relations are taking on a domestic character.

The Constitution of the United States is as defective in this respect as that of any other State. When it was formed, the people of the United States had just succeeded in withdrawing by revolution from a political union which was not according to the American Idea, and they were interested in establishing their own States and their own union according to the American Idea. They had no occasion to consider the proper manner of projecting their own States and their own union into a greater union. Their experience had made them realize the danger of entering into personal and confidential relationship with foreign States, all of whom either derided or parodied the American Idea. It was evidently thought best not to suggest the possibility of union with foreign States, and to leave the matter to be settled in the future, when the occasion should arise.

The situation of the world has not changed since the days of the Constitution. The political science, the law of nations, and the general constitutional law of the world are as yet as crude and undeveloped, as respects the power of treaty and the power of union, as they were at that time. The ruling classes still deride the American Idea or parody it in terms of the French Declaration of the Rights of Man. Now, as then, all States which are honestly intentioned, and the United States in particular, will avoid all projects of unions containing provisions obligating the member States to act otherwise than according to their judgments and consciences. A union on any terms less liberal than these would change the constitution of every State which entered into it and would require to be entered into by the process of constitutional amendment.

The League of Nations' Covenant

The so-called Covenant of the League of Nations contains several provisions which are likely to result in infringement upon the powers of each member State to act according to its reason and conscience, and some which actually do infringe upon those powers. The plan of the League seems to be a composite. In part it seems to be taken from the plan of the "Covenanted Leagues" of individuals, which prevailed openly and secretly in Europe some centuries ago, whereby the members bound themselves by oath to each other and to the ruling council to maintain and propagate a religious faith and a form of political organization, with the object of placing civil government under ecclesiastical control. In part it seems to be drawn from that applied by Spain and England in the sixteenth and seventeenth centuries, whereby the king in his privy council and in his shadowy and inefficient great council, in correspondence with the ducal or provincial councils, ruled the people of the kingdom absolutely. The covenanted leagues produced their own councils of inquisition, absolutely ruling the members of the league by terror of their oaths. The conciliary system of Spain and England produced the High Court of the Inquisition, and the High Court of the Star Chamber, with their processes of secret sentence, excommunication, anathema, and assassination, in contempt of the fundamental law and the fundamental rights of men.

The obligations under the Covenant of the League of Nations are opposed to the American Idea in at least the following respects:

First. The Council and the Assembly are said to have the function of "advising" the member States; but in giving this advice they are not required to observe the fundamental law or any principles whatever. The member States "covenant" to follow the "advice." "Advice" given by one person to another who is obligated on oath to follow the so-called "advice" is command, not advice. When no principles are laid down as obligatory on the adviser, and the person advised binds himself to follow the advice, the power of so-called "advice" is the power of absolute command, in disregard of the fundamental law.

Second. The Covenant defines aggression and wrongdoing in terms of warlike action, whereas the only aggression recognized by the fundamental law is that which occurs when States or governments deprive persons of their fundamental rights without due process of law. Such aggression, and such only, is an aggression against all other States. Each State may properly protect itself against such an aggressor State, by war if necessary; and all States are in duty bound, under the fundamental law, to correct by their joint influences and strength such an aggressor State. To regard a State which makes war on such an aggressor State as the real aggressor is to render the League an agency of perversion and injustice.

Third. The Covenant places the power to direct the activities of right-doing States and to correct the activities of wrong-doing States in the same body of men—an arrangement which in fact makes this body of men at once a legislature, a court, and an executive. Such a

combination of functions in one person or body invariably results in absolute government. The fact that the League provides for a Council and Assembly is of no consequence, since in each of them the two functions are similarly confused.

The Desirable League

Assuming, therefore, that the proposed "League of Nations" is impossible according to the American Idea, the question arises: What kind of a league of nations, or general union of States, is now possible, as a matter of practical politics, according to this idea? It seems clear that the only such league is a general union of States for mutual counsel, in which the member States assume no political obligations and in which each is free to act according to its reason and conscience. That this is possible and practicable is shown by the fact that the United States is a member of two such unions. One of them is the Union of the American Republics, whose organ is the Pan-American Union, located in Washington. The other is the general union of States, as yet unnamed, commonly called the Hague Union. This union is in fact, though not in law, constituted by the Convention for the Peaceful Settlement of International Disputes, formulated by the Hague conferences. Its organs, located at The Hague, are the Permanent Court of Arbitration, the Permanent Administrative Council, and the International Bureau.

Pan-American and Hague Union Model

The union of the American Republics was initiated by the Congress of the United States in 1888, after the idea had been incubated for sixty years. By act of Congress delegates of the American States were invited to assemble at Washington, on a date fixed, as guests of the United States. The object of the Conference, as originally projected, was "to consider such questions and recommend such measures as shall be to the mutual interest and common welfare of the American States." The Congress limited it to discussion of arbitration and improvement of commercial relations. The invitation included a program of subjects to be discussed, but the first was "measures that shall tend to preserve the peace and promote the prosperity of the American States." Thus a way was provided for considering at any conference any matter deemed desirable for discussion by the majority.

The Pan-American Union is a committee of continuation of the conferences. The conferences, with their bureau of continuation, constitute the union. A written constitution formed by the conferences has been drafted, but not adopted. The Hague Union is formed in substantially the same way. The President accepted the invitation to participate in the conferences. The Convention for the Pacific Settlement of International Disputes does not purport to be a written constitution of the Union, although it institutes the common organs. The lack of a continuation committee and the absence of a corporate name render the union imperfect. The program of The Hague Conferences has been limited to the subject of the settlement of international disputes. Because of this unnecessary and undesirable restriction, The Hague Union has accomplished little. The Union of the American Republics, with its more liberal program, has accomplished much for the general welfare of the States concerned. Neither of these political unions involves any political obligations on the part of any member State. The object of both unions is to reach an agreement of opinion, sentiment, and purpose on certain subjects of mutual interest, and to embody the agreements in formal resolutions or in international conventions, leaving the member States free to act according to their own consciences and judgments.

A League of Nations, according to the American Idea, would undoubtedly be one modeled on the plan of the Union of American Republics. It would have for its object to hold periodical conferences "to consider such questions and recommend such measures as shall be to the mutual interest and common welfare" of all the States and unorganized or partly organized peoples. It would have as its organ a continuation committee of common consultation and counsel, to collect information, to make recommendations, and to adjust the program of each conference. Each conference would, however, be free to consider whatever measures the majority should deem needful "to preserve the peace and promote the prosperity" of all the States and peoples concerned. Under such a union no political obligation would be assumed. Each State would hold to its own idea, and in the competition of ideas the American Idea, by reason of its sound basis and its success as applied in the United States in bringing about peace and prosperity, would tend to prevail.

By such a league of mutual counsel, under the lead of the United States, a new part of the law of nations, according to the American Idea, would gradually be evolved, based on the analogies drawn from the part of the private law which is concerned with the personal and confidential relations of men—the law of agency and trust, of copartnership, of cotenancy, of patron and apprentice, of guardian and ward. As the law was evolved, the relation of the States to each other and the relations of all States to the peoples not yet of full political capacity would tend to have less of a foreign and more of a domestic character, and the States would gradually provide themselves with organs of mutual correspondence with the union and with each of the other States, adapted to the new, difficult, and delicate, but highly desirable, relationship.

When such a law of nations has been evolved and accepted, defining the social rights and duties of States; when such institutions of mutual correspondence shall have been established; when all the States have adopted written constitutions according to the American Idea, in which suitable and scientific provisions concerning the power of treaty and the power of union are inserted, a League of Nations in which each State would obligate itself to observe the law of nations might be possible. Such a league, though likely to be formed only in the distant future, would be according to the American Idea. When a formal constitution of such a league shall be drafted by a constitutional convention of all States, the United States may enter it without amending its Constitution; for the law of nations, based on the American Idea, is a part of the Constitution of the United States.